



N 6570-01P

## **EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

### **29 CFR Part 1695**

#### **RIN 3046-AB18**

#### **Procedural Regulations for Issuing Guidance**

**AGENCY:** Equal Employment Opportunity Commission.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Equal Employment Opportunity Commission (EEOC or Commission) proposes to amend its procedural regulations to establish rules for issuing guidance.

These rules make guidance documents readily available to the public, ensure that guidance will be treated as non-binding, require a notice and public comment period for significant guidance, and establish a public petition process for the issuance, amendment, or repeal of guidance.

**DATES:** Comments must be received on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

**ADDRESSES:** You may submit comments by any of the following methods – please use only one method:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions on the website for submitting comments.
- Mail: Comments may be submitted by mail to Bernadette B. Wilson, Executive Officer, Executive Secretariat, Equal Employment Opportunity Commission, 131 M Street, NE, Washington, DC 20507.

*Instructions:* All comments received must include the agency name or Regulatory Information Number (RIN) for this rulemaking. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided. However, the EEOC reserves the right to refrain from posting libelous or otherwise inappropriate comments, including those that contain obscene, indecent, or profane language; that contain threats or defamatory statements; that contain hate speech directed at race, color, sex, national origin, age, religion, disability, or genetic information; or that promote or endorse services or products.

All comments received, including any personal information provided, also will be available for public inspection during normal business hours by appointment only at the EEOC Headquarters' Library, 131 M Street, NE, Washington, DC 20507. Upon request, individuals who require assistance viewing comments are provided appropriate aids such as readers or print magnifiers. To schedule an appointment to inspect the comments at the EEOC's library, contact the library staff at (202) 663-4630 (voice) or 800-669-6820 (TTY). (These are not toll-free numbers.)

**FOR FURTHER INFORMATION CONTACT:** Robert Carter, Special Assistant, Office of Legal Counsel, (202) 663-4692 or [robert.carter@eeoc.gov](mailto:robert.carter@eeoc.gov).

**SUPPLEMENTARY INFORMATION:** On October 9, 2019, President Donald J. Trump issued Executive Order 13891, "Executive Order on Promoting the Rule of Law Through Improved Agency Guidance Documents." It directed most Federal Departments, Agencies, and Commissions to adopt policies to ensure that "Americans are subject only to those binding rules imposed through duly enacted statutes or through regulations

lawfully promulgated under them” and that those subject to such rules shall have “fair notice of their obligations.” Exec. Order 13891, 84 FR 55,235 (October 9, 2019).

The Administrative Procedure Act (APA), section 553 of Title 5, United States Code, generally requires federal agencies engaged in administrative rulemaking to give public notice of proposed regulations, provide interested parties an opportunity to comment, consider and respond to significant comments, and publish final regulations in the Federal Register. Agencies may also clarify existing obligations through non-binding guidance documents, which the APA exempts from the notice-and-comment process.

Executive Order 13891 asserts that some agencies have used guidance in the place of regulations to avoid the APA’s statutory safeguards. To address these concerns, the Executive Order requires agencies to adopt regulations that make guidance documents more readily available to the public, better ensure that guidance will be treated as non-binding, require a notice and public comment period for significant guidance, and establish a public petition process for the issuance, amendment, or repeal of guidance.

This proposal seeks to create a new section, 29 CFR part 1695, to address the requirements of Executive Order 13891 and the Office of Management and Budget’s explanation of these requirements in Memorandum M-20-02. The requirements of this proposed EEOC regulation apply to EEOC guidance documents as defined herein; they do not apply to or otherwise replace the requirements of the APA and associated Executive Orders for regulations or rules. The definitions, requirements, and procedures for issuing guidance, adopted in §§ 1695.1 through 1695.6 of the proposed rule, are modeled on sections 2 and 4 of Executive Order 13891. The adoption of a public petition process for the issuance, amendment, or repeal of guidance in § 1695.7 of the rulemaking

is mandated by section 4(a) of Executive Order 13891. The requirement in § 1695.08 of posting of all existing guidance on the Commission website in a single, searchable, indexed database is consistent with section 3(a) of the Executive Order. (The EEOC launched this webpage on February 28, 2020.) The prohibition in § 1695.9 against the agency citing to rescinded guidance, except for historical purposes, reflects the requirements of section (3)(b) of Executive Order 13891, and the disclaimer of judicial or enforceable rights in regulation § 1695.10 reflects section 7 of the Executive Order.

## **Regulatory Procedures**

### *Executive Order 12866*

The proposed rule will only govern the internal practices of the EEOC. It will not have an annual effect on the economy of \$100 million or more, or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. The proposed rule also will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency, nor will it materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof. Furthermore, it will not raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866. In consequence, this rule is not a "significant regulatory action" within the meaning of section 3 of Executive Order 12866.

### *Paperwork Reduction Act*

This regulation contains no new information collection requirements subject to review by the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

### *Regulatory Flexibility Act*

The Commission certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities because it primarily affects EEOC internal procedure. To the extent that it does affect small entities, it provides free access to all EEOC guidance documents, which may conserve their resources. Further, allowing small employers advance notice of significant guidance, and an opportunity to comment on proposed significant guidance, gives small employers a greater opportunity to have their concerns heard and addressed before documents are finalized.

### *Unfunded Mandates Reform Act of 1995*

This proposed rule will not result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

### *Congressional Review Act*

While this action concerns agency procedure that does not substantially affect the rights or obligations of non-agency parties and, accordingly, is not a “rule” as that term is used by the Congressional Review Act (Subtitle E of the Small Business Regulatory

Enforcement Fairness Act of 1996 (SBREFA)), the Commission will still follow the reporting requirement of 5 U.S.C. 801.

### **List of Subjects in 29 CFR Part 1695**

Administrative practice and procedure, Equal Employment Opportunity

For the Commission.

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Janet Dhillon,  
Chair

Accordingly, the EEOC proposes to add 29 CFR part 1695 to read as follows:

### **PART 1695 - GUIDANCE PROCEDURES**

Sec.

1695.0 Applicability

1695.1 Definitions.

1695.2 Guidance requirements.

1695.3 Good faith cost estimates.

1695.4 Significance determination.

1695.5 Significant guidance requirements.

1695.6 Notice and public comment.

1695.7 Petitions.

1695.8 Public access to current guidance documents.

1695.9 Rescinded guidance.

1695.10 No judicial review or enforceable rights.

Authority: E.O. 13891, 84 FR 55235; OMB Memorandum M-20-02.

#### **§ 1695.0 Applicability.**

This part prescribes general procedures that apply to guidance documents of the Equal Employment Opportunity Commission (EEOC or Commission) under all statutes enforced by the Commission.

#### **§ 1695.1 Definitions.**

(a) *Guidance document* means any statement of Commission policy or interpretation concerning a statute, regulation, or technical matter within its jurisdiction that is intended to have general applicability and future effect, but which is not intended to be binding in its own right and is not otherwise required by statute to satisfy the rulemaking procedures specified in 5 U.S.C. 553 or 5 U.S.C. 556. The term is not confined to formal written documents, and may include letters, memoranda, circulars, bulletins, advisories that set forth for the first time a new regulatory policy. It may also include equivalent video, audio, and Web-based formats. This definition does not apply to:

(1) Rules promulgated pursuant to notice and comment requirements under 5 U.S.C. 553 or similar statutory provisions.

(2) Rules exempt from rulemaking requirements under 5 U.S.C. 553(a);

(3) Rules of Commission organization, procedure, or practice;

(4) Decisions of Commission adjudications under 5 U.S.C. 554 or similar statutory provisions;

(5) Internal executive branch legal advice or legal advisory opinions addressed to executive branch officials;

(6) Commission statements of specific applicability, including advisory or legal opinions directed to particular parties about circumstance-specific questions, notices regarding particular locations or facilities, and correspondence with individual persons or entities;

(7) Legal briefs, other court filings, or positions taken in litigation or enforcement actions;

(8) Commission statements that do not set forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statute or regulation, including speeches and individual presentations, PowerPoint slides, editorials, media interviews, press materials, or congressional testimony that do not set forth for the first time a new regulatory policy;

(9) Guidance pertaining to military or foreign affairs functions;

(10) Grant solicitations and awards;

(11) Contract solicitations and awards; or

(12) Purely internal Commission policies or guidance directed solely to EEOC employees or contractors or to other Federal agencies that are not anticipated to have substantial future effect on the behavior of regulated parties outside of the government; for example, Volume I of the Commission's Compliance Manual, which is only for internal use.

(b) *Significant guidance document* means a guidance document that will be disseminated to regulated entities or the general public and that may reasonably be anticipated:

(1) To lead to an annual effect on the economy of \$100 million or more or adversely affect in a material way the U.S. economy, a sector of the U.S. economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) To create serious inconsistency or otherwise interfere with an action taken or planned by another Federal agency;



(3) To alter materially the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) To raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in E.O. 12866, as further amended. It does not include any other category of guidance documents exempted in writing by OMB's Office of Information and Regulatory Affairs (OIRA).

**§ 1695.2 Guidance requirements.**

(a) Each guidance document shall comply with all relevant statutes and regulations.

(b) It shall be written in plain and understandable English and avoid using mandatory language, such as "shall," "must," "required," or "requirement," unless the language describes an established statutory or regulatory requirement or is addressed to EEOC staff and will not foreclose the Commission's consideration of positions advanced by affected private parties;

(c) It shall identify or include:

(1) The term "guidance" or its functional equivalent and that the Commission is issuing the document;

(2) A unique identifier that provides information on whether the document was subject to a vote (CV) or not (NVT), the year of issuance, and unique number of its issuance and, if applicable, a Z-RIN;

(3) The activity or entities to which the guidance applies;

(4) A short summary of the subject matter covered in the guidance document at the top of the document.

(5) A statement noting whether the guidance is intended to revise or replace any previously issued guidance and, if so, sufficient information to identify the previously issued guidance; and

(6) Citations to applicable statutes and regulations;

(7)(i) A clear and prominent statement of the following: “The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or Commission policies.”

(ii) When binding guidance is authorized by law or is incorporated into contract, the guidance statement in paragraph (c)(7)(i) of this section may be modified to reflect either of those facts.

(d) If the guidance document sets forth the Commission’s position on a legal principle for the first time or changes the Commission’s legal position on any issue, the Commission must approve the guidance document by majority vote. Any significant guidance or guidance that is otherwise subject to notice and comment procedures must be approved by a Commission vote. Any guidance document that requires a vote of the Commission to be approved shall be circulated to the Commissioners, and, if approved, shall be signed by the Chair on behalf of the Commission. If the document is not setting forth a new or changed legal position, is reiterating already established Commission policies, or is otherwise simply providing technical assistance on the laws the Commission enforces without announcing any new policy or legal position, it shall be circulated to the Commission for informational purposes for a period of not less than five

days, unless emergency circumstances do not allow, and shall only require approval, but not signature, by the Chair.

**§ 1695.3 Good faith cost estimates.**

(a) A good faith effort shall be made, to the extent practicable, to estimate the likely economic cost impact of the guidance document to determine whether the document might be significant. It may, however, be difficult to predict with precision the economic impact of voluntary guidance.

(b) When determining the likely economic cost impact, the same level of analysis should be given as that required for a major determination under the Congressional Review Act (5 U.S.C. 801 *et seq.*) and the economic impact on small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

**§1695.4 Significance determination.**

(a) Prior to issuance, the Commission shall provide OIRA with an opportunity to review a guidance document to determine if it meets the definition of “significant guidance document.”

(b) If the guidance document is determined not to be significant, the Commission shall proceed with issuance of the guidance without going through the procedures described in section 1695.05.

(c) In emergency situations, or when required by statutory deadline or court order to act more quickly than normal review procedures allow, the Chair shall notify OIRA as soon as possible and, to the extent practicable, comply with the requirements of this subpart at the earliest opportunity.

**§ 1695.5 Significant guidance requirements.**

(a) Each proposed significant guidance document shall be:

(1) Approved by the Commission before issuance and assigned a Z-RIN through the Regulatory Management System (RMS), or a successor data management system.

(2) Comply with the applicable requirements for regulations, including significant regulatory actions, in E.O. 12866, E.O. 13563, E.O. 13609, E.O. 13771, and E.O. 13777.

(3) Submitted to OMB for coordinated review. Proposed guidance documents that are otherwise important to the Commission's interests may also be submitted for review.

(4) Reviewed by OIRA under E.O. 12866 before issuance.

(b) The Chair may determine that it is appropriate to coordinate with OMB in the review of guidance documents that are otherwise of importance to the Commission's interests.

**§ 1695.6 Notice and public comment.**

(a) Each proposed significant guidance document shall have a period of notice and public comment of at least 30 days, unless the Commission, in consultation with OIRA, finds good cause that such notice and public comment are impracticable, unnecessary, or contrary to the public interest, and incorporates such finding and a brief statement of reasons therefor into the guidance document.

(b) Notice shall be published in the Federal Register announcing that a draft of the proposed guidance document is publicly available on the Federal e-regulation website, and the proposed significant guidance document also shall be posted on the Commission website.

(c) The Commission shall prepare and post a public response to major concerns raised in the comments, as appropriate, either before or when the significant guidance document is finalized and issued.

(d) When appropriate, the Chair may determine that a guidance document that is not otherwise required to go through notice and public comment shall also be subject to a period of public comment following the document's approval by the Commission before the document becomes effective.

(e) Unless otherwise determined in writing by the Chair, upon issuing a significant guidance document, a report shall be submitted to Congress and GAO in accordance with the procedures described in 5 U.S.C. 801 (the "Congressional Review Act").

#### **§ 1695.7 Petitions.**

(a) Any interested person may petition the Commission, in writing, for the issuance, amendment, or repeal of a guidance. Such petition shall state the guidance, regulation, or rule, together with a statement of grounds in support of such petition.

(b) Petitions may be filed with the EEOC, Office of Executive Secretariat, either electronically at the EEOC guidance portal, <http://www.eeoc.gov/guidance>, or in hard copy to U.S. Equal Employment Opportunity Commission, Executive Secretariat, 131 M Street NE, Washington, DC 20507.

(c) Upon the filing of such petition, the Commission shall consider the same and may thereupon either grant or deny the petition in whole or in part, conduct an appropriate proceeding thereon, or make other disposition of the petition.

(d) The Commission should respond to all petitions in a timely manner, but no later than 90 days after receipt of the petition, as to how it intends to proceed. Should the petition be denied in whole or in part, prompt notice shall be given of the denial, accompanied by a simple statement of the grounds unless the denial be self-explanatory.

(e) The issuance, amendment, or repeal of a guidance in response to a petition shall be considered by the Commission pursuant to its regular procedures.

**§ 1695.8 Public access to current guidance documents.**

(a) All current guidance documents shall be published with a unique identifier including, at a minimum, the document's title, date of issuance or revision, and its Z-RIN (if applicable).

(b) All current guidance documents shall made available through a single "guidance portal" on the Commission website, together with a single, searchable, indexed database available to the public;

(c) The guidance portal shall include a statement that guidance documents lack the force and effect of law, except as authorized by law or as incorporated into a contract;

(d) The Commission shall maintain and advertise on its website a means for the public to comment electronically on any guidance documents that are subject to the notice and comment procedures described in § 1695.6 and to submit requests electronically for issuance, reconsideration, modification, or rescission of guidance documents in accordance with § 1695.7; and

(e) Designate an office to receive and address complaints from the public that the Commission is not following the relevant requirements for issuing guidance or is improperly treating a guidance document as a binding requirement.

**§ 1695.9 Rescinded guidance.**

The Commission shall not cite, use, or rely on guidance documents that are rescinded, except to establish historical facts.

**§ 1695.10 No judicial review or enforceable rights.**

This part is intended to improve the internal management of the Commission. As such, it is for the use of EEOC personnel only and is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its agencies or other entities, its officers or employees, or any other person.

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